No. 94-569

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

CASA VEERKAMP, S.A. DE C.V. and WALTHER VEERKAMP,

Petitioners,

vs.

ALBERTO KREIMERMAN, HERMES INTERNATIONAL, INC. and HERMES TRADING COMPANY d/b/a HERMES MUSIC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the Inter-American Convention on Letters Rogatory[1], including the Additional Protocol to the Inter-American Convention on Letters Rogatory, provide the only means for service of process transmitted from the United States to residents of other countries who are parties to this Convention.

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1. The Inter-American Convention on Letters Rogatory (hereinafter "the Inter-American Convention" or "Convention"), was done at Panama City, Panama on January 30, 1975. The Additional Protocol on the Inter-American Convention on Letters Rogatory (hereinafter "the Additional Protocol") was done at Montevideo, Uruguay, on May 8, 1979. *See* __ U.S.T. __, S. Treaty Doc. No. 27, 98th Cong., 2d Sess. (1984). These treaties (Petitioners' Appendix pp. a53-a80) were entered into force in the United States on August 27, 1988.

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Alberto Kreimerman, Hermes International, Inc.[2], and Hermes Trading Company, d/b/a Hermes Music, (hereinafter

2. Hermes International, Inc. and Hermes Trading Company have no parent or subsidiary corporations to disclose under Rule 29.1.

collectively "Kreimerman" or "Respondents"), responds to the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the District Court (Petitioners Appendix pp. a33-a52) are not officially reported. The opinion of the Court of Appeals for the Fifth Circuit (Petitioners' Appendix pp. a1-a32) is reported at 22 F.3d 634.

STATEMENT OF JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

COUNTERSTATEMENT OF FACTS

As far as it is limited to the procedural history of the case, Petitioners' Statement of the Case ("Statement", beginning at page 2 of the Petition) is accurate. However, the Statement also contains Petitioners' version of the law governing this case, and Petitioners' conclusions about errors made by the Fifth Circuit Court of Appeals, all also stated in a factual manner. In this regard the Statement is merely argumentative and should not be considered fact. These arguments are properly part of the Reasons for Granting the Petition urged by the Petitioners. The Petitioners' statement of facts is consistent with, but more limited than, the facts set forth in the opinion of the Fifth Circuit Court of Appeals. The facts in the appellate opinion may lead to a better understanding of the case.

REASONS FOR DENYING THE WRIT

The Fifth Circuit Court of Appeals has correctly interpreted the Inter-American Convention as only one of various methods to serve process. While few judicial decisions discussing its applicability have been made, it is clear from the language of the text, as well as the insights which can be plainly drawn from the document itself, that the Inter-American Convention does not exclude other means for service of process.

I.

STANDARDS FOR INTERPRETATION OF TREATIES

Interpretation of a treaty is a question of law for the Court. *Bonnano v. United States*, 12 Cl. Ct. 769 (1987). The starting point in interpreting any treaty is the text itself. *United States v. Alvarez-Machain*, 504 U.S. __, __, 112 S. Ct. 2188, 2193-94, 119 L. Ed. 2d 441, 451-452 (1992); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989). The language used by the drafters of the treaty, as well as the context in which such language is used, must be examined first. *Eastern Airlines v. Floyd*, 499 U.S. 530, 534, 111 S. Ct. 1489, 1493, 113 L. Ed. 2d 569 (1991). If any ambiguities or difficulties in constructions are encountered, extraneous documents, such as the treaty's history and negotiations, may be relevant in interpretation. *Air France v. Saks*, 470 U.S. 392, 397, 105 S. Ct. 1338, 84 L. Ed. 2d 289 (1985) (*quoting Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-432 (1943).

There exists some authority that "treaties are more liberally construed than contracts." *Air France* at p. 396. However, applicability of this rule is limited to circumstances involving ambiguous or uncertain provisions. As the Fifth Circuit recognizes, respect for the sovereign rights of the signatory or its

citizens dictates that treaties should be construed narrowly rather than broadly. (Opinion, Petitioners' Appendix p. a9). Petitioners complain that the Fifth Circuit has incorrectly limited its construction of the Inter-American Convention and paid "lip-service" to the rules of interpretation, particularly those specifying construction of provisions liberally as opposed to narrowly. In fact, the Fifth Circuit correctly stated this Court's rules with respect to interpreting treaties narrowly rather than broadly.

The primary focus for the Court is to determine the intent of the signatories to the treaty. This canon of interpretation is similar to that of the law of contracts. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253, 104 S. Ct. 1776, 80 L. Ed. 2d 273 (1984); *see also*, Restatement (2d) of the Law of Foreign Relations § 146 (1965); Restatement (3rd) of the Law of Foreign Relations § 325 (1986)[3].

The Fifth Circuit specified in its opinion that it did not rely on any specific rule of construction since the arguments heavily favored non-exclusivity of the treaty (Opinion, footnote 19; Petitioners' Appendix p. a10). The plain language of the Inter-American Convention, taken in context, mandates a determination that it is not the exclusive means for service of process.

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3. Restatement (3rd) of the Law of Foreign Relations § 325 is based on Article 31 of the Vienna Convention on the Law of Treaties, May 22, 1969, 8 I.L.M. 4 (1969). Although the United States is not a party to this treaty, it does recognize that its substance codifies international law of treaties.

II.

ANALYSIS OF TEXT OF CONVENTION AND CONTEXT OF LANGUAGE USED

A. The Convention Expresses No Prohibition or Intent to Prohibit Other Means of Service of Process.

The Inter-American Convention does not contain a provision that expressly prohibits all other means of service of process in civil or commercial cases except as specified in the treaty itself. Article 2 of the Convention, entitled "Scope of the Convention," states that it "shall apply to all letters rogatory," but it *does not state* that letters rogatory are the only means for effecting service, nor does it contain any similar language. Petitioners themselves concede that this language alone does not preempt other means of service of process. (Petition p. 11). The only case presently reported which has addressed this specific issue is *Pizzabiocche v. Vinelli*, 772 F. Supp. 1245 (M.D. Fla. 1991), wherein the Florida District Court also concluded that the Inter-American Convention did not provide the exclusive means for service of process.

The convention does not express any intent that it is intended to preempt other means for service of process. The titles of the Convention and the Additional Protocol are illuminating: Inter-American Convention *on Letters Rogatory* and Additional Protocol on the Inter-American Convention *on Letters Rogatory* (emphasis added). The titles imply that the treaty relates solely to letters rogatory, rather than all or other mechanisms for service of process. In *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987), this Court held that the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* ("the Hague Evidence Convention") was not the exclusive or mandatory means for obtaining documents or

information located in a foreign country. One of the important factors discussed by this Court was the conspicuous lack of expression as to any intent mandating usage of the procedures described therein. *Id.* at p. 535, footnote 19.

As indicated by their titles, neither the Convention nor the Additional Protocol discuss or refer to any other type of document for service, except letters rogatory. What is clear from the text of the Inter-American Convention is that *once* letters rogatory are issued certain procedures relating to service, execution and return must be followed. The Additional Protocol more particularly discusses preparation, transmission and cost of the letters rogatory. The notable absence of reference to other means of process from the text of the treaty does not mean that such other process was prohibited, but only that the Convention did not include them in the agreement.

B. The Additional Protocol to the Convention Does Not Specify Exclusivity.

Petitioners further argue that the text of the Preamble to the Additional Protocol and Article 1 of the Additional Protocol support the premise that service of process by letters rogatory under the Convention is exclusive. Petitioners misinterpret the effect of the Additional Protocol. Contrary to Petitioners' argument, the Additional Protocol is limited to specific acts under the Convention. When the United States ratified the Inter-American Convention, express reservations were made with respect to its assent.[4] These reservations are not at issue in the

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4. The express reservations are as follows:

> 1. Pursuant to Article 2(b) of the Inter-American Convention on Letters Rogatory, letters rogatory that have as their purpose the taking of evidence shall be

(Cont'd)

present case, but are important in explaining the significance of the Additional Protocol.

Petitioners rely upon Article 1 of the Additional Protocol (Petition page 11). Article 1 was drafted by the United States, and applies only to those acts under Article 2(a) of the Convention. Article 1 of the Additional Protocol provides:

> "This Protocol shall apply only to those procedural acts set forth in Article 2(a) of the Inter-American Convention on Letters Rogatory, hereinafter referred to as "the Convention". For the purposes of this Protocol, such acts shall be understood to mean procedural acts (pleadings, motions, orders, and subpoenas) that are served and requests for information that are made by a judicial or other adjudicatory authority of a State Party to a judicial or administrative authority of another State Party and are transmitted by a letter rogatory from the Central Authority of the State of origin to the Central Authority of the State of destination."

(Cont'd)

excluded from the rights, obligations and operation of this Convention between the United States and any other State Party.

2. In ratifying the Inter-American Convention on Letters Rogatory, the United States accepts entry into force and undertakes treaty relations only with respect to States which have ratified or acceded to the Additional Protocol as well as the Inter-American Convention, and not with respect to States which have ratified or acceded to the Inter-American Convention alone.

The Additional Protocol is intended to more clearly specify the procedures to be followed *if* letters rogatory are to be issued for service of process according to Article 2(a) of the Convention only. The language used in this section qualifies the term "procedural acts" to mean those that (i) are served "by a judicial or other adjudicatory authority of a State Party to a judicial or other adjudicatory authority of another State Party" and (ii) are transmitted by a letter rogatory from the Central Authority of one State Party to the Central Authority of another State Party. Other types of service (and other types of letters rogatory) are excluded. The Additional Protocol nowhere states or infers that the Convention is exclusive.

C. Articles 14 and 15 of the Convention Do Not Mandate Exclusivity of Letters Rogatory.

Petitioners place great emphasis on Articles 14 and 15 of the Convention, asserting that these provisions allow methods other than letters rogatory to serve process within certain exceptions and that Respondents' attempt to serve process did not meet the exceptions. Article 14 and 15, which are contained in the section of "General Provisions," are as follows:

"Article 14

> States Parties belonging to economic integration systems may agree directly between themselves upon special methods and procedures more expeditious than those provided for in this Convention. These agreements may be extended to included other States in the manner in which the Parties may agree.

Article 15

> This Convention shall not limit any provisions regarding letters rogatory in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or preclude the continuation of more favorable practices in this regard that may be followed by these States."

Notably, Article 14 contains permissive language such as "may agree" for those cases where States Parties agree between themselves for "special methods and procedures." Further, Article 14 allows other States Parties to join in any of these types of agreements, again using "may" to indicate such possibility. The provisions in Article 14 were not discussed by the Fifth Circuit because they simply are not applicable. These provisions clearly are permissive, and clearly extend to other express agreements not at issue here.

Article 15 provides that the Convention does not exclude presently existing or *future* bilateral or multilateral agreements relating to letters rogatory, and thereby permits alternative means for transmitting letters rogatory. More importantly, Article 15, expressly doe not "preclude the continuation of more favorable practices in this regard" among the States.

Petitioners argue that the Fifth Circuit erred by giving Article 15 an overly narrow construction and making six separate assertions why the Court of Appeals erred. On its face, this provision simply allows States to continue any "more favorable" practices in this regard which may already be followed by these States. Petitioners argue that the second clause of Article 15 requires that the States parties must have previously *agreed* (in bilateral or multilateral agreements) to allow these more favorable

acts to continue. Petitioners' interpretation is an overly limited reading of the section, because the section not only contemplates present agreements, but agreements to arise in the future. "States" therefore, as used in the second clause of Article 15 is very general in that it includes States that may sign agreements in the future, rather than only States which have bilateral or multilateral agreements then in effect. Under this interpretation and omitting the first clause, Article 15 reads as follows:

> "This Convention shall not . . . preclude the continuation of more favorable practices in this regard that may be followed by these States."

If the term "favorable practices in this regard" refers to all service of process, there is no limitation to pre-existing written agreements.

Alternatively, Respondents assert that the phrase "in this regard" refers to no more than the practice of serving letters rogatory. The only subject matter of both the Convention and the Additional Protocol are letters rogatory. The use of "in this regard" appearing in the second clause of Article 15 refers only to the practice of transmitting "letters rogatory" which appears in the preceding clause of Article 15.[5]

Petitioners finally allege that the Fifth Circuit failed to give sufficient weight to the State Department's comments to President Reagan when the treaty was submitted for signature and the advice and consent of the Senate. If these comments are to be considered, they still do not support Petitioners' argument because it is clear

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5. Based on this Court's interpretation of a similar provision in Article 27 of the Hague Evidence Convention, the Fifth Circuit concluded Article 15 to affirmatively permit the States to *unilaterally* continue all existing practices for all service of process. (Petition Appendix, p. a16). *See Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 537-538.

that the State Department's comments are directed to "practices between states concerning letters rogatory." This specific language defeats Petitioners' interpretation of the comment. However, only if a provision is determined to be ambiguous will the rules of construction permit analysis of legislative history. *Air France v. Saks*, 470 U.S. at 397. If they are to be considered at all, the Fifth Circuit has adequately discussed this and other non-textual arguments. (Petition Appendix, pp. a19-a22).

III.

COMPARISON OF THE INTER-AMERICAN CONVENTION TO THE HAGUE EVIDENCE CONVENTION AND CONTRAST TO THE HAGUE SERVICE CONVENTION

Like the Hague Evidence Convention for purposes of discovery, the Inter-American Convention cannot be interpreted to be the sole means for service of process upon persons in Mexico or any of the States Parties. The analysis above regarding interpretation of the text of the treaty and how the words appear in context, without resort to extraneous materials, establishes that the treaty can be interpreted from the ordinary meaning of the words used.

Petitioners assert that the Inter-American Convention should be interpreted as this Court has interpreted the Hague Service Convention, which is the exclusive means for serving process in those countries which have ratified or signed that treaty. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699, 108 S. Ct. 2104, 2108, 100 L. Ed. 2d 722 (1988). However, marked differences between Inter-American Convention and the Hague Service Convention preclude such interpretation.

The Convention is entitled the "Inter-American Convention

on Letters Rogatory," and is thus self-limiting. The Hague Service Convention officially is entitled the "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters," and the title is much broader in scope.

The Preambles to both conventions establish that their purposes are not similar. The Preamble to the Hague Service Convention is:

> "States signatory to the present convention, [D]esiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time. . ."

In contrast, the Preamble tc the Inter-American Convention states:

> "The Governments of the Member States of the Organization of American States, desirous of concluding a convention on letters rogatory, have agreed as follows:"

Comparison of the two Preambles also leads to the conclusion that the Hague Service Convention is intended to supersede all other means for service of process, but that the members of the Organization of American States have merely concurred regarding certain practices concerning the use of foreign letters rogatory within their individual borders.

The text of the Preamble to Inter-American Convention more closely resembles the Hague Evidence Convention, which has been determined to be a non-exclusive means for obtaining information and discovery in foreign countries. *See Societe Nationale Industrielle Aerospatiale,* 482 U.S. at 538. The

Preamble to the Hague Evidence Convention states:

> "The States signatory to the present Convention, [D]esiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose . . ."

The language in this Preamble merely indicates a desire to ease the process for discovery, rather than mandate a particular procedure to be used, and likewise, the Inter-American Convention merely formalizes an agreement with respect to letters rogatory. Neither Preamble contains the preemptory terms or language appearing in the Hague Service Convention that were so convincing to this Court in determining it was the exclusive means for effecting service of process in those countries who signed the treaty. *See Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. at 699.

The presence of an "escape clause" also indicates that the Hague Evidence Convention is not exclusive. *Societe Nationale Industrielle Aerospatiale* at 537. Such a clause is found in the Convention at Article 17:

> "Article 17
>
> The State of destination may refuse to execute a letter rogatory that is manifestly contrary to its public policy ("ordre public")."

The decision of the Fifth Circuit also relies upon this clause in the Convention (Petition Appendix, p. a18).

CONCLUSION

The Inter-American Convention has been properly interpreted by the Fifth Circuit Court of Appeals which concluded that the procedures set forth therein were not the exclusive means for effecting service of process in Mexico and other countries which have ratified or affirmed its provisions. The Petition for Writ of Certiorari filed by Walther Veerkamp and Casa Veerkamp S.A. de C.V. should be denied.

Respectfully submitted,

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